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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

In re) Case No. 10-91936-E-7
WALTER RALPH PINEDA,)
Debtor(s).)
_____))
WALTER RALPH PINEDA,) Adv. Pro. No. 10-9060
Plaintiff(s),) Docket Control No. TMT-3
v.)
BANK OF AMERICA, N.A., et)
al.,)
Defendant(s).)
_____)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM OPINION AND DECISION

The court has been presented with the Motion to Dismiss the Second Amended Complaint. Walter Pineda, the Plaintiff and Chapter 7 debtor (Plaintiff-Debtor) alleges that jurisdiction exists for this proceeding in federal court pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157. No answer has been filed to this Complaint.

1 Defendants Bank of America Corp, L.P., Bank of American, N.A.
2 ("BOA"), ReconTrust Company, N.A. ("ReconTrust"), Bank of New York
3 Mellon, N.A., Inc. ("BNY"), Goldman Sachs, Inc. ("GS"), Goldman
4 Sachs Mortgage Securities Corp. ("GSMSC"), and GSR Mortgage Loan
5 Trust 2003-9 ("GSR Trust"), collectively "Defendants," filed a
6 motion to dismiss the Second Amended Complaint for failure to state
7 a claim pursuant to Rule 12(b), Federal Rules of Civil Procedure,
8 and Rule 7012, Federal Rules of Bankruptcy Procedure. Proper
9 notice has been provided for this motion. The Proof of Service
10 states that the Motion and supporting pleadings were served on
11 Plaintiff on September 26, 2011. By the court's calculation,
12 37 days' notice was provided. Twenty-eight days' notice is
13 required.

14 **Motion to Dismiss the Second Amended Complaint**

15 In response to the Second Amended Complaint in this Adversary
16 Proceeding, Defendants filed a second motion to dismiss for failure
17 to state a claim pursuant to Rule 12(b), Federal Rules of Civil
18 Procedure, and Rule 7012, Federal Rules of Bankruptcy Procedure.
19 Defendants argue that:

- 20 (1) Jurisdiction is not proper in this Court, citing to the
21 court's ruling on the prior motion to dismiss, Dckt. 141,
22 p. 31-32, that if the Plaintiff elected to file a second
23 amended complaint to address why the court should not
24 abstain from allowing the state law and federal law
25 non-bankruptcy cases to be litigated in this bankruptcy
26 court.
- 27 (2) Plaintiff's primary argument, which relies on the premise
28 that the transfer or sale of the Note deprives Defendants
of any interest in the Note and Deed of Trust, fails as
a matter of law.
- (3) Plaintiff has not credibly alleged tender.
- (4) Plaintiff fails to state a claim for foreclosure fraud.

1 (5) Plaintiff's claim for rescission fails because rescission
2 is not a cause of action, but a remedy, and Plaintiff has
not tendered the amount owed on the loan.

3 (6) Plaintiff's claim for wrongful foreclosure fails because
4 Defendants fully and lawfully complied with the
5 non-judicial foreclosure process and the claim is
premature as the property has not be foreclosed on.

6 (7) Plaintiff's claim for declaratory relief fails because
7 Plaintiff alleges no new allegations, but instead raises
identical issues already raised in other claims.

8 Because the court finds that the amended complaint fails to state
9 a cognizable claim as currently drafted, the Court's decision is to
10 grant the motion to dismiss as to all claims against all
11 Defendants, without prejudice and without leave to amend.

12 Additionally, as addressed in detail in the Memorandum Opinion
13 and Decision granting the Defendants' prior motion to dismiss, this
14 litigation has no bearing on the administration of the Debtor's
15 Chapter 7 bankruptcy estate. There is no reorganization being
16 attempted by the Debtor. Rather, it appears that the only reason
17 this matter is pending in this court is to use the automatic stay
18 as to the estate in lieu of obtaining a preliminary injunction in
19 state court or the district court, to the extent that
20 non-bankruptcy federal jurisdiction exists.¹

21 **FACTS AS ALLEGED BY PLAINTIFF**

22 In the Plaintiff's second amended complaint, the Plaintiff
23 alleges that he owns real property commonly known as 22550 Bennett
24 Road, Sonora, California, (the "Property") and that BOA is
25 attempting to foreclose on this property illegally. ReconTrust is
26

27 ^{1/} The Debtor having obtained his discharge on September 7,
28 2010, the automatic stay has been terminated as to the Plaintiff-
Debtor by operation of law. EDC Case No. 10-91936, Dckt. 31,
11 U.S.C. § 362(c) (2) (C).

1 alleged to be a subsidiary of BOA and is acting as the trustee
2 under the deed of trust recorded against the property. The
3 Plaintiff further alleges that BNY is a trustee for the GSR Trust,
4 and GS is an investment banker who sold certificates for GSR Trust.
5 Also, Plaintiff now alleges that USB is involved and may be the
6 true holder of the note.

7 The dispute begins with a loan obtained by the Plaintiff in
8 the amount of \$473,000.00, which is documented by a promissory note
9 ("Note") and a deed of trust ("Deed of Trust") recorded against the
10 Property for a loan obtained from BOA. The Deed of Trust names BOA
11 as the lender and beneficiary, and nominates PRLAP, Inc. as
12 Trustee. A Substitution of Trustee and Assignment of Deed of
13 Trust, in which BOA substituted ReconTrust as trustee under the
14 Deed of Trust was recorded February 9, 2010. The Plaintiff alleges
15 that BOA attempted to foreclose on the Property due to an alleged
16 default on the Note. The Plaintiff obtained the loan for the
17 purchase and improvement of his residence and for a second
18 residence on the Property.

19 Plaintiff then suffered from a serious illness which required
20 extensive hospitalization. This medical condition prevented
21 Plaintiff from meeting his financial obligations, and he requested
22 a loan modification from BOA. This request for a home loan
23 modification was through the Home Affordability Program ("HAMP").
24 After one year without hearing about the application, Plaintiff
25 filed a complaint to the Comptroller of the Currency. The
26 particular facts surrounding that application are still in dispute.

27 Following Plaintiff's alleged default under the terms of the
28 loan, ReconTrust, acting as agent for the Beneficiary under the

1 Deed of Trust (BOA), recorded a Notice of Default and Election to
2 Sell Under Deed of Trust (Notice of Default).

3 **THE ADVERSARY PROCEEDING**

4 Plaintiff filed this adversary proceeding with the initial
5 Complaint on August 20, 2010. The First Amended Complaint ("FAC")
6 was filed February 11, 2011, and was dismissed without prejudice
7 and with leave to amend pursuant to the Memorandum Decision and
8 Order dated June 24, 2011. The Second Amended Complaint ("SAC")
9 was filed July 26, 2011, alleges that:

- 10 (1) The court has jurisdiction over this adversary proceeding
11 pursuant to 28 U.S.C. §§ 1334 and 157, 11 U.S.C. §§ 362,
544, 550, 551, 157(b)(1)-(2), (I), (K), and (O).
- 12 (2) This adversary is a core proceeding pursuant to 28 U.S.C.
13 § 1409 and involves a proceeding to determine the
14 validity and extent of a lien on property of the
15 bankruptcy estate and to recover money pursuant to Rule
16 7001(1) and (2), Equitable Relief (6) and Declaratory
17 Judgment (9).
- 18 (3) Defendants are illegally attempting to foreclose on the
19 Plaintiff's property, commonly known as 22550 Bennett
20 Road, Sonora, California, due to an alleged default on
21 the Note.
- 22 (4) Defendants did not disclose to the Plaintiff the
23 contractual agreements between the various
24 investor/creditor at the time he signed the loan
25 documents.
- 26 (5) Defendant BOA transferred the Note, Deed of Trust, and
27 Substitution of Trustee on February 9, 2010, and thus had
28 no authority to foreclose on the property in violation of
California Civil Code § 2429(a)(1) et seq., which
requires beneficial interest or agency relationship with
the holder of the note.
- (6) Wachovia Bank breached its duty to perform its obligation
to receive, review property chain of title and recorded
the documents.
- (7) Defendant BOA breached its sub-servicer obligations in
complying with their obligations to collect monthly loan
payments and advance delinquent loan payments.

- 1 (8) Defendant BOA fraudulently instructed Defendant
2 ReconTrust to file a Notice of Default, knowing it was
not the payee of Plaintiff's Note and Deed of Trust.
- 3 (9) Defendant BOA instructed T. Sevillano, a low level clerk,
4 to prepare and execute an assignment of deed of trust,
5 note, and substitution of trustee, knowing it did not
have the right to enforce the note, and which was
defectively notarized by Janet Koch.
- 6 (10) Defendant BOA failed to comply with its obligations as
7 sub-servicer that resulted in Plaintiff's reliance that
8 his home modification applications were in the process of
evaluation that could result in complete forbearance as
reported in the financial news and media.
- 9 (11) Defendant BOA obtained the services of DocX Inc. to
10 fabricate the assignment of deed of trust, note and
11 substitution of trustee, and then instructed low level
clerk T. Sevillano to execute them.
- 12 (12) Defendant BOA, through its spokesperson, admitted to
13 "robo signers" who executed documents without knowledge
of their contents.
- 14 (13) Defendant failed in correcting Plaintiff's victimization
15 by "robo signer" T. Sevillano which subjected Plaintiff
to imminent foreclosure and eviction.
- 16 (14) Defendant BOA then instructed Defendant ReconTrust to
17 record the fabricated documentation with the Tuolumne
County Recorder after it was defectively notarized.
- 18 (15) The submission of fraudulent documents to the court and
19 county recorders violate both State and Federal civil and
20 criminal codes.
- 21 (16) Defendant BOA's violation of the notice requirement of
22 California Civil Code § 2934(b)(4) constitutes wrongful
23 foreclosure for lack of notice and two trustees for one
24 deed of trust.
- 25 (17) The fraudulent foreclosure attempt by Defendant BOA and
26 Defendant ReconTrust constitutes bad faith and unclean
27 hands conduct that precludes relief of imposing tender
28 prior to contesting the lack of prudential standing to
foreclose.
- (18) Defendants GS and GSSC's filing of form 15D with the
Securities and Exchange Commission notifying all parties
of its termination of registration and suspension of its
duty to file reports, prohibits the collection, sale, or
transfer of certificates during the suspension period;
this includes foreclosure proceedings related to the
securities mortgage loan certificates.

- 1 (19) Defendant GS's purchase of sub-prime loans that were
2 predicted by Defendant GS to default within two to five
3 years was part of Defendants' deceptive business
4 practice.
- 5 (20) Defendant BOA's inducement to accept the credit funds of
6 the loan believing the funds were provided by Defendant
7 BOA created an illusory contract that did not identify
8 the proper parties, terms and conditions, obligations of
9 all the parties involved, constitutes absence of mutual
10 assent, giving rise to Plaintiff's claim of rescission.
- 11 (21) Defendants have not only violated the consumer protection
12 laws including Unlawful Competition Law Bus. Professional
13 Code § 17200 by its deceptive business practice that has
14 resulted in the loss of Plaintiff's property value, but
15 has also caused Plaintiff emotional distress.
- 16 (22) The alleged note failure to disclose the parties involved
17 and their contractual obligations, the credit to
18 "Tranche" accounts from Plaintiff's monthly payments, and
19 the substantial difference in amounts owned by Plaintiff
20 as reflected in the notice of default and monthly
21 statements are proof of no mutual assent by Plaintiff and
22 violation of accounting disclosure requirements under
23 RESPA.

24 Plaintiff prays for an Order for evidentiary hearing for
25 determination of the rights and obligations of the parties through
26 a declaratory judgment, finding of foreclosure fraud that gives
27 rise to punitive damages, finding of wrongful foreclose, finding of
28 rescission of contract for absence of consideration and no mutual
assent, declaration that the adjustable rate note executed by
Plaintiff as an unsecured note subject to 11 U.S.C. § 506 et seq.,
punitive damages, finding Defendants' actions constitute a material
breach of contract and violate RESPA, UCL Cal. Bus. Prof. Code
17200, and other just relief, including the issuance of a
preliminary injunction during the evidentiary hearing proceedings.

**FEDERAL COURT JURISDICTION AND ENTRY
OF ORDER BY BANKRUPTCY COURT**

Jurisdiction for this matter arises under 28 U.S.C. § 1334(b)

1 which provides for original but not exclusive federal court
2 jurisdiction for all civil proceedings arising under Title 11 (the
3 Bankruptcy Code), or arising in or related to cases under Title 11.
4 Federal court jurisdiction is exclusive for all property, wherever
5 located, of a debtor as of the commencement of the case and of
6 property of the estate. 28 U.S.C. § 1334(e)(1). The United States
7 District Court for the Eastern District of California has referred
8 to this bankruptcy court all matters arising under, arising in or
9 related to Title 11 as authorized in 28 U.S.C. § 157(a). This
10 bankruptcy court may thereon enter final judgments and orders on
11 all cases under Title 11, core proceedings arising under Title 11
12 or arising in a case under Title 11, and non-core proceedings to
13 which the parties have consented, with all such rulings being
14 subject to appellate review. 28 U.S.C. § 157(b)(1)(2), and (C)(2).

15 This court is authorized to consider whether, in the interests
16 of justice or comity with state courts, from abstaining to hearing
17 a proceeding related to a case under Title 11. 28 U.S.C.
18 § 1334(c)(1). Abstention may be raised by the court *sua sponte* or
19 on motion of a party. *Smith v. Wall Mart Stores*, 305 F.Supp.2d 652
20 (SD MISS 2003). The Plaintiff's Chapter 7 bankruptcy case was
21 filed on May 20, 2010. The Chapter 7 Trustee filed a Report of No
22 Distribution on August 21, 2010. Dckt. 28. On September 7, 2010,
23 the Plaintiff obtained his discharge. The discharge terminated the
24 automatic stay as to the Plaintiff and property of the Plaintiff,
25 but not property of the bankruptcy estate. 11 U.S.C. § 362(c)(2)
26 (C). It was not until almost three months after the discharge was
27 entered that the Plaintiff amended his Schedule B to list the
28 claims in this lawsuit as an asset and claim them as exempt.

1 Dckt. 33. On July 18, 2011, Chapter 7 Trustee, Gary Farrar,
2 entered into a Stipulation to Abandon with Plaintiff, authorizing
3 him to prosecute and abandon the claims alleged in the adversary
4 proceedings to the Debtor. Dckt. 163, filed in the Adversary
5 Proceeding and not the Chapter 7 bankruptcy case or noticed to
6 creditors.

7 The Plaintiff has chosen to proceed in a Chapter 7 case and
8 immediately discharge his debts, rather than consummate a plan of
9 reorganization and make provisions for some payments to creditors.
10 Thus, this litigation has no bearing on the treatment of creditors,
11 payment of claims, or administration of property of the bankruptcy
12 estate. There appears to be no connection or reason for this
13 adversary proceeding to be before this court other than it is a
14 remnant of the completed Chapter 7 proceeding. No Bankruptcy Code
15 issues appear to remain in this case, nor any assets to be
16 administered by the trustee or the Plaintiff through any plan.

17 Furthermore, Defendants dispute Plaintiff's assertion that
18 this adversary proceeding is a core proceeding within the meaning
19 of 28 U.S.C. § 157(b). The adversary proceeding here seeks to
20 determine the validity of the note and deed of trust.

21 Among the types of proceedings Congress has denoted as "core,"
22 are "determinations of the validity, extent, or priority of liens."
23 28 U.S.C. § 157(b)(2)(K). Core proceedings, by definition, are
24 matters that arise in or under Title 11. *Stern v. Marshall*, 564
25 U.S. ___, 131 S. Ct. 2594, 2605, 180 L. Ed. 2d 475, 490 (2011).
26 This court, therefore, may enter final orders subject to review
27 pursuant to 28 U.S.C. § 158. See 28 U.S.C. § 157(b)(1). Arguably,
28 the validity of the deed of trust, which creates the secured claim,

1 is an issue that would plainly be resolved in the claims allowance
2 process. However, no assets of the estate are being administered
3 for distribution to creditors.

4 The Adversary Proceeding is at a minimum a "related
5 proceeding" and could be a core proceeding relating to the
6 administration of the bankruptcy estate assets. However, given
7 that the Adversary Proceeding is not being prosecuted by the
8 Trustee as part of the administration of the estate, but by the
9 Debtor to recover for himself personally, the court proceeds with
10 this as a related to proceeding.

11 This bankruptcy court may conduct a related to proceeding
12 pursuant to 28 U.S.C. § 157(c)(1) or (2). The Defendants have
13 filed the present motion to dismiss, requesting that this
14 bankruptcy court dismiss the adversary proceeding. The Motion does
15 not assert that proposed findings of fact and conclusions of law
16 are to be submitted by this court to the district court, but that
17 "this (bankruptcy) court grant the Motion and dismiss all claims
18 asserted against Defendants with prejudice." Motion to Dismiss,
19 p.3:1-2, Dckt. 173.²

20 The Plaintiff having affirmatively requested relief from this
21 bankruptcy court, rather than filing the Second Amended Complaint
22 in the state court or district court, and the Defendants having
23 affirmatively requested relief from this bankruptcy court on this
24 Motion to Dismiss, and not asserting that proposed findings of fact
25 and conclusions of law are to be submitted to the district court,
26 the bankruptcy court shall issue the order on this Motion to

27
28 ^{2/} The Plaintiff-Debtor erroneously stated at the hearing
that the Defendants had not submitted the present motion for a
ruling by the judge of the bankruptcy court.

1 Dismiss the Adversary Proceeding.

2 **ANALYSIS**

3 In considering a motion to dismiss, the court starts with the
4 basic premise that the law favors disputes being decided on their
5 merits, and a complaint should not be dismissed unless it appears
6 beyond doubt that the plaintiff can prove no set of facts in
7 support of his claim which would entitle him to the relief.
8 *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt
9 with respect to whether a motion to dismiss is to be granted should
10 be resolved in favor of the pleader. *Pond v. General Electric*
11 *Company*, 256 F.2d 824, 826-827 (9th Cir. 1958). For purposes of
12 determining the propriety of a dismissal before trial, allegations
13 in the complaint are taken as true. *Kossick v. United Fruit Co.*,
14 365 U.S. 731, 731 (1961).

15 The complaint must provide more than labels and conclusions,
16 or a formulaic recitation of a cause of action; it must plead
17 factual allegations sufficient to raise more than a speculative
18 right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555
19 (2007). Federal Rule of Civil Procedure 8, made applicable to this
20 adversary proceeding by Federal Rule of Bankruptcy Procedure 7008,
21 requires that complaints contain a short, plain statement of the
22 claim showing entitlement to relief and a demand for the relief
23 requested. Fed. R. Civ. P. 8(a). As the Court held in *Bell*
24 *Atlantic*, the pleading standard under Rule 8 does not require
25 "detailed factual allegations," but it does demand more than an
26 unadorned accusation or conclusion of a cause of action. *Bell*
27 *Atlantic*, 550 U.S. at 555.

28 To survive a motion to dismiss, a complaint must contain

1 sufficient factual matter, accepted as true, to state a claim to
2 relief that is plausible on its face. A claim has facial
3 plausibility when the plaintiff pleads factual content that allows
4 the court to draw the reasonable inference that the defendant is
5 liable for the misconduct alleged.

6 *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed.
7 2d 868, 884 (2009) (citations and quotation marks omitted). Rule 8
8 also requires that allegations be "simple, concise, and direct."
9 Fed. R. Civ. P. 8(d)(1).

10 In ruling on a 12(b)(6) motion to dismiss, the Court may
11 consider "allegations contained in the pleadings, exhibits attached
12 to the complaint, and matters properly subject to judicial notice."
13 *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court
14 need not accept unreasonable inferences or conclusory deductions of
15 fact cast in the form of factual allegations. *Sprewell v. Golden*
16 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the
17 court required to "accept legal conclusions cast in the form of
18 factual allegations if those conclusions cannot be reasonably drawn
19 from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d
20 752, 754-55 (9th Cir. 1994).

21 **A. Declaratory Relief**

22 Declaratory relief is an equitable remedy distinctive in that
23 it allows adjudication of rights and obligations on disputes
24 regardless of whether claims for damages or injunction have arisen.
25 "In effect, it brings to the present a litigable controversy, which
26 otherwise might only be tried in the future." *Societe de*
27 *Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th
28 Cir. 1981). The party seeking declaratory relief must show (1) an

1 actual controversy and (2) a matter within federal court subject
2 matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 744 (1998).
3 There is an implicit requirement that the actual controversy relate
4 to a claim upon which relief can be granted. *Earnest v. Lowentritt*,
5 690 F.2d 1198, 1203 (5th Cir. 1982). The court may only grant
6 declaratory relief where there is an actual controversy within its
7 jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th
8 Cir. 1994). The controversy must be definite and concrete. *Aetna*
9 *Life Ins. Co. v. Haworth*, 300 U.S. 2271 240-41 (1937).

10 Plaintiff includes a number of different allegations and
11 requests in the declaratory relief. Essentially, the Plaintiff
12 seeks a determination of which party actually holds the note and
13 that the obligation owing on the note is dischargeable in this
14 bankruptcy case. Further, Plaintiff asks that the lien held by GRS
15 Trust is determined to be void and unenforceable. Additionally,
16 the Plaintiff requests monetary damages, special damages, and
17 punitive damages. Plaintiff requests a determination that the
18 substitution of trustee and notice of default were invalid.

19 The Court cannot determine which Defendants, if any, are
20 actually asserting interest in the note and deed of trust and which
21 are persons that the Plaintiff is asserting may claim an interest
22 in the note of the deed of trust. Plaintiff maintains that the
23 purported transfer of the Note to GSR Trust was invalid and BOA did
24 not have the authority to file a Notice of Default on Plaintiff's
25 property, as they did not have an interest in the note. This
26 echoes the argument submitted to the court in the FAC. If the note
27 was transferred to GSR Trust, as the documentation submitted to the
28 court provides, the note, then GSR Trust has the beneficial

1 interest in the deed of trust. GSR Trust can elect to act through
2 agents, such as a loan servicer, to take actions such as
3 foreclosures. See, *Baisa v. Indymac Fed. Bank*, No CIV-09-1464 WBS
4 JMR, 2009 WL 3756682, *3 (E.D. Cal. Nov. 6, 2009) (MERS had the
5 right to assign its beneficial interest to a third party);
6 *Weingartner v. Chase Home Finance, LLC*, 7202 F. Supp. 2d 1276, 1280
7 (D. Nev. 2010) (Courts often hold that MERS does not have standing
8 as a beneficiary because it is not one, regardless of what a deed
9 of trust says, but that it does have standing as an agent of the
10 beneficiary where it is the nominee of the lender [who is the
11 "true" beneficiary].)

12 The Declaratory Relief Cause of Action does not reflect how it
13 impacts the bankruptcy case. Rather, the Plaintiff seeks to
14 address non-bankruptcy issues, attempting to invoke federal
15 jurisdiction and the power of this court through his Chapter 7
16 liquidation. While the Plaintiff discusses confusion over the
17 parties, there is no allegation that there is a dispute between the
18 various parties as to the right to enforce the Note. While the
19 Plaintiff asserts that there are issues of prudential standing, no
20 one other than the Plaintiff has sought to assert any rights in
21 connection with the bankruptcy case. As stated by the Plaintiff in
22 the First Cause of Action, the dispute is over whether BOA can
23 proceed with a nonjudicial foreclosure which occurs outside of this
24 bankruptcy case, and which the court notes does not impact the
25 administration of this estate.

26 Again, as with the FAC, the Plaintiff fails to state a
27 plausible claim that BOA has no right to enforce the Deed of Trust
28 which secures the Note. The possibility that the monies owed on

1 the Note to be paid for by the collateral may go to the principal
2 of the Bank (GSR Trust) does not preclude BOA from fulfilling
3 obligations as the servicer. Thus, this claim is dismissed without
4 prejudice and without leave to amend.

5 **B. Foreclosure Fraud**

6 Plaintiff asserts a number of actions by Defendants that
7 constituted fraud including, failing to provide accounting, failing
8 to disclose the relevant parties on the note, recording the deed of
9 trust, note and substitution of Trustee knowing they were not the
10 holders of the note. Essentially, Plaintiff's fraud argument is
11 that Defendant BOA knew assigning the property documents was a
12 misrepresentation, intended to induce Plaintiff into believing that
13 BOA was the beneficiary, which he relied on to make payments to GSR
14 Trust.

15 The Ninth Circuit Court of Appeals interprets Federal Rule of
16 Federal Procedure 9(b), as made applicable to this adversary
17 proceeding by Federal Rule of Bankruptcy Procedure 7009, to require
18 that the complaint (1) specify the fraudulent representations;
19 (2) specify the representations were false when made; (3) identify
20 the speaker; (4) state when and where the statements were made; and
21 (5) state the manner in which the representations were false and
22 misleading. *Decker v. GlenFed Inc.*, (*In re Glenfed, Inc. Sec.*
23 *Litig.*), 42 F.3d 1541, 1547 n.7 (9th Cir. 1994) (*en banc*),
24 superseded by statute on other grounds as stated in *In re Silicon*
25 *Graphics, Inc.*, 970 F. Supp. 746, 754 (N.D. Cal. 1997); *Lancaster*
26 *Cnty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397,405 (9th
27 Cir. 1991); *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-04 (9th
28 Cir. 2003). This is consistent with common law fraud in

1 California. *Seeger v. Odell*, 18 C.2d 409 (1941), and *Manderville*
2 *v. PCG&S Group*, 146 Cal. App. 4th 1486 (2007). Merely because a
3 dispute exists between the parties does not support a claim for
4 fraud. The Plaintiff must at least plead more to survive a motion
5 to dismiss.

6 A fraud claim is subject to the additional pleading
7 requirements of Fed. R. Civ. P. 8(b) and Fed. R. Bankr. P. 7008.
8 The Plaintiff may not merely recite the statutory elements for
9 fraud, but must plead a plausible case based on the alleged facts
10 in this case.

11 Plaintiff's fraud argument is similar to the first amended
12 complaint and is similarly flawed. The Plaintiff alleges that
13 Defendants committed fraud in securitizing his note. It is
14 contended, without support, that any potential subsequent sale or
15 transfer of the Note (an instrument, and likely a negotiable
16 instrument) must have been first disclosed to the Plaintiff prior
17 to his borrowing the money from BOA. No legal basis for this
18 contention has been presented to the court. More significant to
19 the court is that the Debtor never alleges that he intended to be
20 part of a further transaction concerning the potential sale or
21 transfer of the Note. The only transaction between the Plaintiff
22 and BOA was the Plaintiff obtaining loan proceeds from the Bank.
23 The Debtor obtained a loan and had set terms by which he had to
24 repay the obligation. Irrespective of what further transactions
25 occurred with the Note, the Plaintiff's obligations and rights
26 would did not change.

27 Plaintiff further alleges that this securitization somehow
28 stripped off the security interest. As to the first allegation,

1 Plaintiff fails to state how having his note sold or transferred to
2 the GSR Trust caused him any harm or what fraud was committed to
3 this Plaintiff. If there is no harm, there is no relief that the
4 court can grant. It is not alleged that any of the Plaintiff's
5 rights and obligations under the Note were altered. Again, any
6 fraud claim in relation to the UCL (California Unfair Competition
7 Law) also requires that Plaintiff suffer an actual injury.
8 California Business and Professions Code § 17204, *Kwikset Corp. v.*
9 *Superior Court*, 51 Cal. 4th 310 (2011).

10 The SAC fails to state with particularity the circumstances or
11 facts showing the misrepresentations that resulted in harm or
12 injury to him. Again, with limited exception, all of the conduct
13 of the Defendants complained about arose after the Plaintiff
14 obtained the monies he wanted from BOA through the loan. Though
15 the Plaintiff received everything he was entitled to receive from
16 the loan (the money), Plaintiff believes that because of subsequent
17 financial transactions involving the Note were entered into by BOA
18 and others, any obligation to Plaintiff on the Note were
19 extinguished. The SAC still does not allege any claim or grounds
20 by which the Note, the negotiable instrument, has been destroyed.
21 Whoever the owner of the Note may be, the Plaintiff still has the
22 obligation to pay under the note, and this obligation did not
23 change through these subsequent transactions. No harm or injury to
24 the Plaintiff has been pled as to the conduct of the Defendants in
25 these transactions.

26 As such, Plaintiff's claim for fraud is dismissed without
27 prejudice and without leave to amend.

28 ///

C. Wrongful Foreclosure/Tender

A plaintiff cannot challenge a foreclosure proceeding (whether it is pending or has already occurred) without first credibly alleging tender. *Karlsen v. American Savings and Loan Assoc.*, 15 Cal. App. 3d 112, 117-18 (1971); *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, 207 Cal. App. 3d 1018, 1021 (1989). A valid and viable offer of tender means that it is made in good faith, the party making the tender has the ability to perform, and the tender is unconditional. See, MILLER & STARR, CALIFORNIA REAL ESTATE, §§ 1493-1495 (3d ed. 1989). A failure to allege such tender makes the claim deficient on its face. *Alicea v. GE Money Bank*, 2009 WL 2136969 (N.D. Cal. 2009). However, the requirement of tender may be waived. *Standley v. KNAPE*, 113 Cal. App. 91, 102 (1031); *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 291 (1911); and MILLER & STARR, CALIFORNIA REAL ESTATE 1 § 10:212 (3d ed.).

First, Plaintiff states in the SAC that there was an offer of tender for the purchase of the Property, but does not state the circumstances of such an offer. 2d Amend. Complaint P 29. Then, Plaintiff argues that tender is inapplicable because Defendants' "bad faith and unclean hands conduct" precludes relief of imposing tender. 2d Amend. Complaint P 61. Further, Plaintiff argues in his response that tender may not be required where it "would be inequitable to require tender." Opposition P 10.

Essentially, to the extent Plaintiff properly allege that the foreclosure was procured through fraud or that the sale is void as defective, then he is not required to tender. As Plaintiff has failed to properly allege in the amended complaint that the foreclosure was procured through fraud, as described above, this

1 claim for relief is dismissed, without prejudice.

2 Even if the fraud claim was properly pled, the amended
3 complaint fails to describe how the deed of trust has become
4 invalid. The complaint attacks the assignment of the trust deed
5 and therefore concludes that the trust deed itself is now invalid.
6 No discussion of specific facts that lead to this novel legal
7 conclusion is offered. Further, no specific facts regarding the
8 attempt to tender are set forth in the complaint. The Complaint is
9 deficient on its face and must be denied.

10 As such, Plaintiff's Third Cause of Action for Wrongful
11 Foreclosure is dismissed without prejudice and without leave to
12 amend.

13 **D. Rescission of Contract**

14 The claim for rescission of contract in Count IV of the SAC
15 includes a number of assertions. The Plaintiff argues there was no
16 mutual assent between the mortgagor and mortgagee when the
17 agreement was first signed because Defendant BOA, the initial
18 lender, immediately sold the loan after the transaction and
19 converted it into certificates. Plaintiff had no knowledge of the
20 various intermediaries involved in this process. Plaintiff claims
21 that BOA induced Plaintiff to accept the funds for the loan by
22 making him believe BOA was providing the funds. This is alleged to
23 have created an illusory contract which did not identify the proper
24 parties, terms and conditions, obligations of the parties and
25 created the absence of mutual assent from which Plaintiff can
26 rescind the contract.

27 However, it is not contended that the Plaintiff did not borrow
28 the money on the terms as provided in the note. Plaintiff asserts

1 that he should be allowed to rescind the Note and Deed of Trust
2 because the Note was negotiated or transferred. This is the
3 hallmark of negotiable instruments under the Commercial Code.
4 Plaintiff further asserts that he should know who all of the
5 investors were who may have provided money to BOA to fund his loan.

6 For all of the creative gyrations in attempting to assert a
7 right of rescission, the Plaintiff fails to state grounds under
8 which the court may order the remedy of rescission. No matter how
9 he twists and turns in attempting to attack his loan, he borrowed
10 money from BOA, obtained the money he desired, and was obligated to
11 repay the debt on the terms as provided in the Note.

12 The Fourth Cause of Action for Rescission of Contract is
13 denied without prejudice and without leave to amend.

14 **E. Additional Requests**

15 Plaintiff rehashes some of the arguments that the Court
16 previously dismissed in the First Amended Complaint, but does not
17 include them in clear claims of action as before. These claims are
18 included in counts which do necessarily address them on their face.

19 Plaintiff claims breach of contract because of the violations
20 of consumer protection laws. The standard elements for a breach of
21 contract claim are "(1) the contract, (2) plaintiff's performance
22 or excuse for nonperformance, (3) defendant's breach, and
23 (4) damage to plaintiff therefrom." *Wall Street Network, Ltd. v.*
24 *New York Times Co.*, 164 Cal. App. 4th 1171 (2008). If this is what
25 Plaintiff meant to claim, it fails on its face for a number of
26 reasons. As discussed above, Plaintiff failed to perform on the
27 contract - he stopped paying on the note and provides no reason why
28 this nonperformance should be excused. Further, Plaintiff has not

1 pled any damages flowing from the alleged breach of contract.
2 Thus, the claim for breach of contract is dismissed without
3 prejudice and without leave to amend.

4 Plaintiff also alleges violations of the Real Estate
5 Settlement Procedures Act (RESPA) as Defendants failed to disclose
6 accounting documentation to Plaintiff. From this amended
7 complaint, it is still difficult to tell what harm Plaintiff
8 suffered as a result of not obtaining a full accounting, as stated
9 in the FAC. As there are no new allegations of harm, this claim is
10 dismissed without prejudice and without leave to amend.

11 Plaintiff claims Defendants were involved in deceptive
12 business practices in violation of consumer protection laws
13 including Unlawful Competition Law Bus. Professional Code § 17200.
14 The 2004 Amendments to the UCL specifically require that the
15 Plaintiff have suffered an actual injury. Cal. Bus. & Prof. Code
16 § 17204. The allegations stated in the SAC do not show the harm
17 caused by the Defendants and how it resulted in actual injury to
18 the Plaintiff. As such, this claim is dismissed without prejudice
19 and without leave to amend.

20 **ABSTENTION**

21 In granting broad federal court jurisdiction for arising
22 under, arising in, and related to proceedings, Congress also
23 granted this court the authority to abstain from hearing a matter
24 in the interests of justice or comity, or respect for state law.
25 28 U.S.C. § 1334(c)(1). A decision to abstain is not reviewable on
26 appeal under 28 U.S.C. §§ 158(d), 1291, 1292, or 1254.

27 In ruling on the motion to dismiss the FAC, the court
28 specifically addressed the issue of abstention and directed the

1 Plaintiff to address that issue if he filed a second amended
2 complaint. Memorandum Opinion and Decision, Dckt. 141. The
3 Plaintiff's opposition to the present Motion fails to address this
4 fundamental issue of federal court jurisdiction for related to
5 bankruptcy proceedings. While using a heading called
6 "Jurisdiction" in his opposition, it merely makes reference to
7 28 U.S.C. § 157 and contains a number of factual allegations as to
8 the alleged improper conduct of BOA.

9 The SAC continues the Plaintiff's theme that great social
10 wrongs have been done which he will vindicate through this
11 Adversary Proceeding. These arguments make it crystal clear that
12 this Adversary Proceeding has nothing to do with the Chapter 7
13 bankruptcy case, any of the Plaintiff's rights as a Chapter 7
14 debtor, or the administration of the bankruptcy case.

15 The Plaintiff fails to provide the court with any substantial
16 arguments as to why his litigation of state and non-bankruptcy
17 issues should be tried in this specialized court rather than
18 properly in either the state court or district court, each being
19 courts of general jurisdiction. Though bankruptcy courts regularly
20 preside over matters arising under state law, such is done to
21 further the purposes of the Bankruptcy Code and statutory scheme
22 providing for debtors and creditors enacted by Congress.

23 In the present case, it is appropriate for the court to
24 abstain from determining the state law and non-bankruptcy federal
25 law issues raised and referenced by the Plaintiff. All of his
26 issues and claims can, and should, be properly resolved in the
27 appropriate state or district court. The bankruptcy court must be
28 cognizant of the broad reach of 28 U.S.C. § 1334 jurisdiction, the

1 special role of the bankruptcy court, and the exercise of that
2 jurisdiction as necessary and appropriate to enforce the Bankruptcy
3 Code.

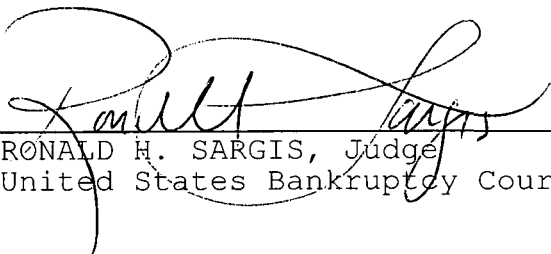
4 Though the parties have not asserted abstention for this
5 Adversary Proceeding, the court shall issue an order to show cause
6 why it does not abstain from further proceedings in this court in
7 favor of the Plaintiff bringing any claims in the state court or
8 district court.

9 **CONCLUSION**

10 The Motion to Dismiss the Second Amended Complaint is granted
11 and the case is dismissed without prejudice with respect to each
12 and every claim stated therein against each and every Defendant.
13 The dismissal is without prejudice and without leave to amend.

14 This Memorandum Opinion and Decision constitutes the court's
15 findings of fact and conclusions of law. A separate order
16 consistent with this ruling shall be issued by the court.

17 Dated: December 6 , 2011

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20 RONALD H. SARGIS, Judge
21 United States Bankruptcy Court
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This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

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